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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1955

LUCIEN V. AMOS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The petitioner, Lucien V. Amos, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 15, 1974.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, not yet reported, appears in the Appendix hereto. The memorandum opinion of the United States District Court for the Western District of Missouri, Western Division, not officially reported, filed September 27, 1973, appears in the Appendix hereto.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eighth Circuit was entered on May 15, 1974. A timely Petition for Rehearing or for Transfer to the Court en Banc was filed therein and was denied on June 4, 1974. This petition for certiorari is filed within thirty (30) days of that date. This Court's jurisdiction is invoked under *28 U.S.C. Section 1254(1)*.

QUESTIONS PRESENTED

1. Was the petitioner unconstitutionally denied a fair trial by an impartial jury as a result of the trial court's requiring a juror to reveal his vote on each count in open court?

2. Was the petitioner denied a fair trial as a result of the introduction in evidence of events and crimes occurring prior to 1968 which were not alleged in the Indictment and were barred by the Statute of Limitations, and by the introduction in evidence of exhibits which were irrelevant and prejudicial?

3. Was the petitioner denied a fair trial and prejudiced as a result of the trial court charging the jury that the defendant-petitioner, rather than the Government, contended that several documents were false and fraudulent?

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual ser-

vice in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 26:

Section 7206

(2) Aid or assistance—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document; or

* * *

RULES INVOLVED

United States Code, Title 18:

Federal Rules of Criminal Procedure:

Rule 31. VERDICT

(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

* * *

(d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

STATEMENT OF THE CASE

The petitioner, Lucien V. Amos, was convicted on each count of a 14-count indictment after trial by jury on August 21 through August 24, 1973, before the Honorable Paul X Williams in the United States District Court for the Western District of Missouri. Each count of the indictment charged a violation of 26 U.S.C. §7206(2), in that the defendant wilfully and knowingly aided and assisted in the preparation of certain tax returns which were false and fraudulent as to a material matter in that the returns represented that the taxpayers were entitled to claim itemized deductions exceeding that which the defendant knew the taxpayers were entitled to claim. Each count of the indictment was in the same format with variances as to the years, taxpayers named, and the amounts involved. The years covered in the indictment were, as to the five taxpayers, between 1968 and 1972. Only one of the taxpayers (none of whom were criminally

charged) admitted having knowledge of the false claimed deductions. During the direct examination of the various taxpayers, testimony was elicited that petitioner had been preparing their returns in the past, during years that were not alleged in the indictment and which were barred by the Statute of Limitations, *26 U.S.C.* §*6531.*

The petitioner testified that he prepared the tax returns from information supplied him by the taxpayers. Certain documents (Government's Exhibits 23, 24, 25, 26 and 27), which the Government claimed were false, were furnished to the Internal Revenue Service by the petitioner when the various returns were audited. These documents were prepared and furnished at dates after the alleged returns were prepared.

During the trial court's instructions and charge to the jury, the court substituted the word "defendant" for the word "Government" so that the instruction as to these documents was:

> "Several documents have been offered in this trial which the defendant contends were false and fraudulent. You are instructed that the defendant, Lucien V. Amos, was not charged with the submission of these documents and they are only allowed into this trial for the purpose of showing the defendant's intent at the time he prepared the tax returns which are the subject matter of the indictment."

Although the correct instruction appears in the transcript, counsel for the Government and the defendant agreed that the trial court misread the instruction.

After the evidence closed and the court instructed the jury, the jury retired at approximately 2:48 P.M. and deliberated until 4:07 P.M., when the jury returned to the courtroom and announced that it had reached a ver-

dict. On the Court's own motion, the jury was polled, but juror Crockett told the Court that he did not join in the verdict on all counts in the indictment.

The following statements were made in open court after the jury had returned its first verdict:

"THE COURT: Now, Mr. Betts, since you are the foreman and have signed the verdict, I will just take everybody and start with you, is this not only the verdict of—the unanimous verdict of the jury, is it your personal verdict in each of the 14 cases?

MR. BETTS: Yes Your Honor. . . (Transcript p. 840).

* * *

THE COURT: Mr. Crockett?

MR. CROCKETT: No sir.

THE COURT: Did you join in the verdict in any of the counts?

MR. CROCKETT: Yes sir.

THE COURT: The jury will retire to reconsider its verdicts, then as soon as you have reached unanimous verdicts—return the forms to Mr. Betts, there has been a misunderstanding. As soon as you have reached unanimous agreement, now—now, Mr. Foreman, in as much as there are 14 counts, if there is unanimous consent on any counts, indicate the ones on which it is unanimous, because the court would be inclined to receive that verdict, that is unanimous as to a count; that would leave the jury to consider the ones that are not, am I making myself clear? . . . (Transcript p. 841).

* * *

THE COURT: We are talking about as to each count. Let me have that verdict—

THE COURT: I got down to Mr. Crockett; Mr. Crockett as to the verdict in Count I, which is the C. F. and Nina Schnabel count for 1967, did you or did you not—is this verdict in Count I, is that or is that not your individual verdict?

MR. CROCKETT: I misunderstood in a way, I thought we were voting a different way than that.

THE COURT: I am trying to find out now—the verdict must not only be the verdict of the jury, it must also be the individual verdict of each juror. Now, I am down to you. As to Count I, which is the 1967 one concerning C. F. and Nina Schnabel, in which it appears the verdict of guilty, is guilty your individual verdict in that particular count?

MR. CROCKETT: No sir. I don't think he would be guilty on that.

THE COURT: Count II, the Schnabel one for 1968, do you agree with that one?

MR. CROCKETT: No sir.

THE COURT: As to 1969 for the Schnabels?

MR. CROCKETT: On some parts of it I do.

THE COURT: It either is or is not.

MR. CROCKETT: It is not.

THE COURT: Count IV, the 1970 of the Schnabels?

MR. CROCKETT: Guilty on that I believe.

THE COURT: As to the count on C. R. and Earlene Powell, 1969?

MR. CROCKETT: I could not go along with that one either." (Transcript pp. 842-843).

The trial court then interrogated Mr. Crockett on each and every count of the indictment concerning his vote. Juror Crockett reported that on every count except Count IV that he did not believe the defendant was guilty and had voted not guilty during the jury deliberations. The Court then resumed its interrogation of the remainder of the jury and each of them stated that they had found the defendant guilty. At the conclusion of the remainder of the poll, the following occurred:

> "THE COURT: The verdict of the jury as to Count IV, the C. F. and Nina Schnabel count will be received by the court as a finding of guilty. The clerk will prepare a new form eliminating Count IV. This is received as to Count IV only . . .
>
> MR. KING: (Petitioner's trial counsel) I am wondering if you could ask if it was unanimous as to that count again?"

The trial court then again polled each member of the jury up to Mr. Crockett. Each juror preceding Mr. Crockett voted guilty on Count IV of the indictment. When the Court reached Mr. Crockett, however, the following occurred:

> "THE COURT: Mr. Crockett?
>
> MR. CROCKETT: I still say the same.
>
> THE COURT: Mr. King is entitled to know and the court is entitled to know as to Count IV, the C. F. and Nina Schnabel verdict for 1970, is it your individual verdict, Mr. Crockett, that the defendant is guilty?
>
> MR. CROCKETT: I think the one that is his claim, I don't think the one who prepared the income tax, the preparer, was guilty.

THE COURT: Ladies and gentlemen of the jury, none of these verdicts will be received. This is not a unanimous verdict and we cannot receive it. Anything that is less than a unanimous verdict I cannot receive and I am going to send you back with this and be certain and will give you another chance. I hope you are able to arrive at a verdict. If you are, well and good, if you are not, well and good. We will keep you for a longer period of time. Take this back and give it to Mr. Betts and conduct the jury back to their jury room." (Transcript pp. 846-847).

After the jury had again retired at approximately 4:25 P.M., the court noted that there was a substantial possibility of a mistrial and Mr. King, the attorney for the defendant so moved, but the trial court overruled that motion and stated that they would await the jury's findings. (Tr. 847-848). At 4:48 P.M. the jury returned and was polled and each one of the jurors, including Mr. Crockett, stated that they had found the defendant guilty on all fourteen counts. The jury had deliberated again only a matter of a few minutes before returning with this second verdict. The court then interrogated juror Crockett as to this verdict:

"THE COURT: Now, since we have had the matter of the identity, Mr. Crockett, are you certain you understand?

MR. CROCKETT: I am certain I understand.

THE COURT: You intend to return a verdict of guilty on each of the 14 counts?

MR. CROCKETT: Yes sir. . ." (Transcript p. 852).

Petitioner was sentenced, on October 23, 1973, to a term of imprisonment of three years, the execution of which was suspended on the condition that he spend at least three months in a jail type institution, and he was placed on probation for three years on the remaining thirteen counts.

Petitioner appealed to the United States Court of Appeals for the Eighth Circuit which affirmed his conviction. The trial court's action regarding the jury poll was sustained because of *Federal Rules of Criminal Procedure, Rule 31 (d)* and because the Court of Appeals found that the action of the trial court did not coerce a final verdict. The introduction in evidence of the exhibits and the evidence of prior events was held to be proper as bearing on the issue of intent. As to the misdirection during the court's charge the Court of Appeals held that it was error, but harmless.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Has Decided an Important Question of Federal Law Which Should Be Settled by This Court.

Jury Poll

The trial court interrogated juror Crockett in open court concerning the extent, nature and basis of his verdict after the court learned that the verdict returned by the jury was not unanimous. Juror Crockett, no doubt, was embarrassed over the entire situation and it is obvious he was coerced into surrendering his own views, opinions and conscience to the will of the majority. August 24, 1973, the day the verdict was returned was a Friday, and the hour was growing late in the afternoon. It was

brought clearly to his attention that the other eleven jurors disagreed with him and he was told by the court that he, and his fellow jurors, would be kept "for a longer period of time", because of his failure to agree with the majority. This action by the trial court unfairly invaded the province of the jury, coerced a verdict, destroyed the sanctity of the privacy of the jury deliberations and unconstitutionally denied petitioner his *Sixth Amendment* right to a fair and impartial jury and the requirement of *Federal Rules of Criminal Procedure, Rule 31 (a)* that verdicts be unanimous, which is a fundamental right under due process of law under the *Fifth Amendment*.

This Court in *Brasfield* v. *United States* (1926), 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345, held that an inquiry by a trial court of a jury unable to agree asking the extent of its standing numerically is erroneous. Mr. Justice Stone wrote:

> "We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend on circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general, its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned."

The situation in the present case is clearly in line with the coercion condemned in *Brasfield*. The jury returned to the courtroom and each and every member of the jury was polled as to his verdict. Thus, the judge asked and found out how the jury stood numerically. Juror Crockett versus the eleven others. Mr. Crockett was required to vote in open court on each and every count in the indictment, and to reveal his position to all those present. Rather than stopping his interrogation of the jury, the trial court then proceeded to inquire of the remaining jurors how they had voted on the indictment. The coercive nature of the trial court's acts were heightened by the procedure which the Court chose to use. The trial court then went to great lengths to emphasize the importance of a unanimous verdict and the fact that the jurors would quite obviously have to deliberate until a unanimous verdict was reached. Juror Crockett was placed in the obvious position of being embarrassed and humiliated simply because he had conscientiously held out and had voted as his conscience dictated. He had been forced to stand and openly announce his conflict with the entire jury on each and every count.

The shortness of time in which the jury deliberated during the second deliberation, clearly emphasizes the pressure that Juror Crockett felt. The original "verdict" had taken almost two hours to reach. The subsequent verdict was returned in a matter of a few minutes. The trial court then again drew everyone's attention to juror Crockett when he was asked in open court if he was certain "that he understood" the verdict.

Rule 31 (d) provides that if upon a poll there is not unanimous concurrence the jury should be directed to retire for further deliberations or be discharged. Here the trial court early in the proceedings learned the jury

was not unanimous. If the court believed there might be unanimity on one or more counts the jury should have been directed to retire to deliberate and return a verdict upon such counts.

Petitioner respectfully suggests that this is an issue that should be settled by this Court because of the importance of the question and the need for guidelines to be followed by trial courts in such situations.

Events Outside the Indictment and Evidence of Other Crimes

From the very beginning of the opening statement of the Government, throughout the entire trial, and in the Government's closing argument, the Assistant United States District Attorney went to great lengths to emphasize the long and continued nature of the defendant's income tax preparation business, constantly emphasized the possible criminal nature of his business prior to the years mentioned in the indictments, and repeatedly insinuated that the defendant had been practicing criminal fraud against the United States for numerous years, but had only recently been brought to the bar of justice.

For example, even in her opening statement, the Assistant United States Attorney noted that Mr. Schnabel had gone to the defendant for income tax assistance as early as 1964, and when his conscience began bothering him about certain deductions, he filed amended tax returns from 1964 through 1971. However, the indictment charged only that the income tax returns from 1968 to 1971 had been fraudulently prepared. The same inferences were made as to other taxpayers.

Each witness was asked as to how long the petitioner had prepared his tax returns, and as to what years he had filed amended tax returns, and as to how long they

"knew" that the defendant might be claiming improper deductions for them. The defendant's objections to the introduction of such evidence was overruled by the trial court.

The trial court instructed the jury:

> "Since intent has an element your objection will be overruled. Ladies and gentlemen of the jury, for any evidence admitted into the record here for your consideration it does not concern one of the specific counts, you will consider that information only in regard to whether or not there was an intent to violate the law on behalf of the defendant." (Tr. 195).

Of course, the instruction itself was clearly improper and highly prejudicial in that it allowed the jury to consider any evidence which did not concern one of the specific counts on the question of intent. Such an instruction is over broad, an improper statement of the law, and allows the jury a roving commission to consider any evidence which it chooses on the question of intent, perhaps even evidence which has been objected to and the objection sustained by the trial court.

During the closing arguments by the Assistant United States District Attorney, Miss Senner argued:

> "Now, Mr. Schnabel told you ladies and gentlemen that when he looked at the '64 return, his '64 return, he noticed there were items on there that he was not entitled to claim and that he asked Mr. Amos about them when he noticed these on the return. Well, the first one he noticed was the credit union entry of interest. As I recall Mr. Schnabel's testimony, he said that he had called Mr. Amos about this and did not tell him as he should have 'what is that doing on my return, I don't have any credit union interest'

but he said 'What about this credit union interest' and Mr. Amos said 'Don't worry about it, I can provide a receipt of the credit union'. . ." (Tr. 751-752).

Exhibits 23, 24, 25, 26, and 27

The trial court erred in admitting into evidence the Government's Exhibits No. 23, 24, 25, 26, and 27, in that the exhibits constituted evidence of other crimes, and were irrelevant to the defendant's intent at the time of the alleged offense.

For example, Government's Exhibit No. 24 was a receipt made out to Frederick Keith Taylor indicating that the Blue Ridge R.L.D.S. Church had received a financial contribution from Taylor. It was the Government's contention that the receipts were false and fraudulent, and were admitted into evidence although it was acknowledged that the receipts were made out long after the alleged offense had been committed. Government's Exhibit No. 25 was a mass produced letter sent out by the Mission Health Foundation to list the contributions which they had received from the contributor who received the letter. The Government contended that the letters were false and fraudulent and they were admitted into evidence although the particular exhibits were completed long after the alleged offense had occurred. Government's Exhibit No. 26 was a record of local church contributions made out in the name of Mr. and Mrs. Powell. It was also admitted into evidence under the same conditions noted earlier as was Government's Exhibit No. 27, a listing from the Central Stakes Savings Association showing interest paid by Mr. Powell. Even assuming the documents to be false and fraudulent, they constituted evidence of other unrelated crimes in that presenting the same to the Internal Revenue Service auditor constituted a criminal of-

fense in violation of *18 U.S.C. 1001*, and *26 U.S.C. 7207*, and *26 U.S.C. 7206(c)*. In any event, because of the remoteness in time between the filing of the tax return and the submission of the documents to the Government auditor, these documents cannot logically be said to show defendant's intent at the time the tax returns in question were prepared.

In *Toussie* v. *United States*, 397 U.S. 112, 90 S.Ct. 858, 25 L.Ed.2d 156 (1970), Mr. Justice Black stated:

> "The purpose of a Statute of Limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far distant past."

The evidence clearly established that the documents were not made, printed, or even thought of by the petitioner until well after the time of the offense, and the evidence was unreputed by the Government. In *Hartman* v. *United States*, 215 F.2d 386 (8th Cir. 1954), the court held:

> "In order for wrongful acts not included in a charge to be admissible to prove intent, they must be of such a character that as a matter of logic they tend to demonstrate a criminal intent in the acts within the charge."

As also noted in *Hartman*, such evidence may well have a cumulative effect which requires reversal. As the court found:

"It need not be decided that some particular item of the irrelevant testimony was of itself so prejudicial as to necessitate reversal. The cumulative effect of the mass of evidence outside the scope of the indictment that was brought into the trial was to obscure the issue and to permit conviction that may well have been based on the general character of the defendant . . . The overall effect of the mass of evidence extraneous to the issue was to allow the jury to suspect that the defendant was a bad character. His right was to be tried for the specific offense charged against him."

Instruction

The trial court charged the jury that:

"Several documents have been offered in this trial which the defendant contends are false and fraudulent. You are instructed that the defendant, Lucien V. Amos, was not charged with the submission of these documents and they are only allowed into this trial for the purpose of showing the defendant's intent at the time he prepared the tax returns which are the subject matter of the indictment." (Tr. 804).

Obviously from the evidence it was the Government's contention that the exhibits were false and fraudulent, and the petitioner contended (in fact it was an essential part of petitioner's defense) that the documents were valid.

Both the Government and the defense objected to it and the trial court acknowledged its error, but refused to correct it. The trial court's only statement was "Somebody is entitled to reverse me". (Tr. 832). The court reporter did not reflect the error, but all parties agree it occurred.

When the court exchanged the word "defendant" for the word "government" it, in effect, removed all of the precautionary element involved, which was the essence and necessity of the instruction. In fact, the instruction as given was highly prejudicial and inflammatory to the defendant in that it told the jury that the defendant had admitted the false and fraudulent nature of the documents. The court, by this instruction, deprived the petitioner of his defense.

Generally, the giving of an erroneous instruction to the jury is grounds for a new trial where such instruction influenced or may have influenced the verdict and was prejudicial. In determining what is misleading or prejudicial, the commonly accepted test is how the instructions will naturally be understood by the average men composing juries. *Government Employees Insurance Company* v. *Davis*, 266 F.2d 760 (5th Cir. 1959). Where the instruction is erroneous, or even confusing, reversal is required. *United States* v. *Harvey*, 428 F.2d 782, 783 (1970). A conviction cannot rest on an ambiguous instruction or an instruction which improperly defines a basic issue or defense for the jury. *Bollenbach* v. *United States*, 326 U.S. 607, 613, 66 S.Ct. 402, 90 L.Ed. 350.

Of course, it must be assumed that the jury listened to and understood and followed the instruction as given by the court. To do otherwise would defeat the entire purpose and meaning of jury instructions, and the court instructed the jury it was their duty to follow the court's instructions. Neither the balance of the instruction, nor any other portion of the instructions given by the trial court did anything to correct the false direction which had been given to the jury.

The Court of Appeals, in its opinion, found this to be harmless error. This appears not to be reconcilable

with the guidelines on harmless error set out in *Chapman* v. *California* (1967), 386 U.S. 18, 87 S.Ct. 824. A defendant has, or should have, the constitutional right to have his defense presented in the trial court's charge and that that charge be correct as to law and fact. Certainly due process as guaranteed by the *Fifth Amendment* should include this as a fundamental right of fairness. Petitioner submits that this Court should decide this very important question of federal law and that the Court of Appeals sanctioned such a departure by the district court as to call for an exercise of this Court's power of supervision.

2. The Eighth Circuit Court Rendered a Decision in Conflict with the Decision of Another Court of Appeals on the Same Matter.

Jury Poll

The Fifth Circuit Court of Appeals in *United States* v. *Sexton* (1972), 456 F.2d 961, held contrary to the Eighth Circuit. In *Sexton* the trial court polled the jury at the defendant's request. When one of the jurors was asked if the guilty verdict was her verdict, the juror responded "I didn't vote either way". The Court then asked her if the guilty verdict was her verdict and she then answered, yes that it was. The trial court, however, sent the jury back to the jury room to reconsider their verdict and to be sure that it was the verdict of each one of them. He emphasized that there must be a unanimous verdict and that all jurors must vote on it. Thereafter, the jury returned from a second consideration of its verdict and announced a unanimous verdict of guilty. Another poll showed that the verdict was then unanimous and the court accepted the verdict.

The Fifth Circuit there found that the juror had been, in effect, required to vote in open court and without further deliberation with the other jurors. The court found

that by requiring the juror to vote publicly in an open court room, rather than the jury room, *Fed. Rule Crim. Proc. 31* was violated and a reversal for a new trial was required. The court further noted the obvious pressure kept by the juror after returning to the jury room.

The Fifth Circuit quoted with approval with principles announced in *United States* v. *Thomas*, 449 F.2d 1177, 1181 (D.C. Cir. 1971). The court there found:

> "Every defendant in a federal criminal case has the right to have his guilt found, if found at all, only by the unanimous verdict of his peers. Any undue intrusion by the trial judge into this exclusive province of the jury is error of the first magnitude. When efforts to secure a verdict from the jury reach the point that a single juror may be coerced into surrendering views conscientiously entertained, the jury's province is invaded and the requirement of unanimity is deluded."

See also *United States* v. *Edwards* (1972, 5 CA), 469 F.2d 1362; *United States* v. *Matthews*, 252 A.2d 505 (D.C. App.) and *United States* v. *McCoy*, 429 F.2d 739 (D.C. Cir. 1970).

CONCLUSION

Petitioner respectfully submits that this proceeding involves a decision that conflicts with decisions in other circuits, involves important questions of federal law which has not been, but should be, settled by this Court, and that the decision below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

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APPENDIX

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 73-CR-78-W-4

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LUCIEN V. AMOS,
Defendant.

MEMORANDUM OPINION

(Filed September 27, 1973)

The 14 count indictment in this case charged in each count that the defendant, Lucien V. Amos, did in violation of 26 U.S.C. 7206 (2) willfully and knowingly aid and assist in the preparation of certain specified United States Individual Income Tax Returns for certain years, knowing each of said returns was false and fraudulent as to a material matter, namely, the itemized deductions which said taxpayers were entitled to claim.

After a trial lasting several days the jury returned a verdict of "guilty" on all counts (and judgment was entered accordingly.) The court now has pending the "Defendant's Motion in Arrest of Judgment or in the alternative Motion for New Trial" and the 10 points alleged by defendant are as follows:

1. The indictment filed herein fails to state all the essential facts or elements of the offense, and is not a

plain, concise and definite statement of the essential facts constituting the offense as required by Federal Rules of Criminal Procedure 7(c); that said indictment does not advise defendant of the nature and cause of the accusations made against him as required by the Fifth and Sixth Amendments of the United States Constitution.

2. The evidence fails to establish the guilt of the defendant of the offense charged beyond a reasonable doubt.

3. That the evidence does not establish that the alleged offense was committed by the defendant with a criminal or felonious intent.

4. The verdict is not supported by substantial evidence.

5. The Court erred in denying defendant's motion for a directed verdict at the close of the government's evidence, for the reasons set forth in said motion which are hereby incorporated by reference.

6. The Court erred in admitting into evidence the government's Exhibits Nos. "23", "24", "25", "26" and "27", said exhibits constituting evidence of other crimes, irrelevant to defendant's intent at the time of the alleged offense, and inadmissible as hearsay.

7. The Court erred in charging the jury as follows: "Several documents have been offered in this trial which the *defendant* (emphasis added) contends are false and fraudulent. You are instructed that the defendant, Lucien V. Amos was not charged with the submission of these documents and they are only allowed into this trial for purposes of showing the defendant's intent at the time he prepared the tax returns which are subject matter of the indictment," and in refusing to charge the jury

as follows: "Several documents have been offered in this trial which the *government* (emphasis added) contends are false and fraudulent. You are instructed that the defendant, Lucien V. Amos was not charged with the submission of these documents and they are only allowed into this trial for purposes of showing the defendant's intent at the time he prepared the tax returns which are the subject matter of the indictment."

8. The Court erred in charging the jury as follows: "A deduction from gross income is allowed by the Internal Revenue laws, within limits not pertinent here, for such charitable contributions as are actually paid by the taxpayer during the taxable year to religious, charitable, educational and similar nonprofit organzations," and in refusing to charge the jury that charitable contributions also include out-of-pocket expense and transportation expenses in carrying out the charitable endeavors.

9. The Court erred in denying defendant's motion for a mistrial after the polling of the jury.

10. The verdict of guilty was not freely and unanimously given in violation of the Fifth and Sixth Amendments of the United States Constitution.

In defendant's Motion, the first five points deal with the sufficiency of the indictment and the evidence. However, they are not substantiated in defendant's brief by any citations, references or comments.

We have carefully considered these and all the other points raised and find no error in the record which warrants disturbing the verdict.

Count 1 of the indictment reads as follows:

That on or about the 26th day of January 1968 Lucien V. Amos, in the Western District of Missouri, did, in viola-

tion of 26 U.S.C. §7206(2), willfully and knowingly aid and assist in the preparation of the U.S. Individual Income Tax Return of Charles F. and Nina L. Schnabel, Jr., hereinafter taxpayers, for the calendar year 1967 which are false and fraudulent as to a material matter, in that it represented that the said taxpayers were entitled under the provisions of the Internal Revenue Laws to claim itemized deductions in the total sum of $2,292.43 whereas, as the said LUCIEN V. AMOS then and there well knew and believed, the total itemized deductions which the said taxpayers were entitled to claim for the said calendar year were in the total sum of approximately $1,720.43.

All other counts followed the same format with proper variances as to the years, parties named, and the amounts involved.

We fail to see how the indictment is in any manner defective. It follows the language of the statute and complies with the requirements of Federal Rules of Criminal Procedure 7(c) in that it is a "plain, concise and definite written statement of the essential facts constituting the offense charged."

Furthermore, it sufficiently informed the defendant of the charges against him so that he could prepare to meet them; and it was sufficiently definitive for the defendant to plead double jeopardy in the event of further proceedings against him. See, *U. S.* v. *Grayson*, 416 F.2d 1073 (5th Cir. 1969), cert. denied 396 U.S. 1059, reh. den. 399 U.S. 917 and *Wheeler* v. *U. S.*, 317 F.2d 615 (8th Cir. 1963).

As to the sufficiency of the evidence, there was an abundance on all counts to support the charges in the indictment, and the jury chose to disbelieve the testimony of the defendant.

Of the allegations of error contained in defendant's motion, it is the contention of defendant that the most aggravated was the denial of defendant's motion for a mistrial after the Court, on its own motion, polled the jury. The Court first polled the foreman, Mr. Betts, who was asked whether the verdict was not only that of the jury, but also his personal verdict. Juror Betts responded in the affirmative, and the Court proceeded to question six more jurors in the same manner. Each of these jurors indicated that the verdict was in fact his own. The next juror was Mr. Crockett. Juror Crockett indicated that he did not agree with the verdict of the other jurors. Juror Crockett then stated something to the effect that he had not understood what the jury was voting on and said he thought the taxpayer should be held responsible for the accuracy of his own tax return. The Court questioned juror Crockett with regard to each of the fourteen counts to determine on what counts Juror Crockett disagreed with the other jurors. Juror Crockett indicated that he believed the defendant was probably guilty on Count IV. The Court then proceeded to poll the remaining jurors as to Count IV, and each stated defendant was guilty. Upon request of defendant's counsel to re-poll Juror Crockett as to Count IV, the Court polled all the jurors preceding Juror Crockett as to Count IV and each stated that defendant was guilty. When the Court again questioned Juror Crockett concerning Count IV he again indicated that he felt it was the taxpayers who were guilty. The Court then asked the jury to retire to see if they could reach a verdict, and defendant moved the Court for a mistrial.

The Court determined from polling that Juror Crockett's responses were based on his belief that the taxpayer rather than the one who prepared the tax returns should be responsible for their accuracy.

The Court in the exercise of its discretion felt that the jury should re-consider the verdict and directed the jury to go back to the jury room.

After a brief time the foreman sent word that the jury had arrived at verdicts.

The Court, on its own motion, again polled the jury and afforded opportunity to counsel for defense to ask questions of the jury. This poll revealed proper verdicts of the jury as to each count.

Federal Rules of Criminal Procedure, Rule 31(d) provides as follows:

> "When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll, there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged."

The purpose of polling the jury is to ascertain whether or not the verdict, as announced by the foreman, is in fact the verdict of all the jurors. It enables the jurors to correct a verdict mistakenly reached or about which the jurors, on reflection, have some doubt. *Humphries* v. *District of Columbia*, 174 U.S. 190, 194 (1899).

In this case the Court of its own motion polled the jury. After the poll of the jury disclosed lack of unanimity, the Court sent the jury back to the jury room to consider its verdicts.

The case at bar is not analogous to *Brasfield* v. *United States*, 272 U.S. 448 (1926) cited by defendant, since in that case the jury had indicated their inability to agree to a verdict and the court asked the jury to reveal its division. This case is more similar to *Williams* v. *United States*, 419

F.2d 740, 744-47 (D.C. Cir. 1969), where as in this case a juror became confused and the court tried to clarify the verdict of the juror. The Court of Appeals for the District of Columbia Circuit held (at 746) that "in our view these efforts were essentially neutral and are not objectionable as having been intended or calculated to affect her judgment." The Court distinguished a situation where the trial judge attempted to clear up some confusion and actions that produced a likelihood that a juror had been coerced.

In the *Williams* case, the court did not conduct an additional poll when the jury again returned with a unanimous verdict. Here, the Court again polled the jury and specifically asked Juror Crockett if he understood and agreed with the verdict. Mr. King (attorney for defendant) was asked by the Court if he desired to ask the jurors any further questions and he indicated that he did not.

In *United States* v. *Sexton*, 456 F.2d 961, 964 (5th Cir. 1972) the court condemned the practice where a juror was "in effect, required to vote in open court and without further deliberation with the other jurors." In the *Sexton* case the juror indicated that he had not voted either way and the court continued to ask him what his verdict was. The Court, citing its own case of *United States* v. *Bendicks*, 449 F.2d 313 (5th Cir. 1971), approved the procedure where a district judge found upon poll of the jury that the verdict was not unanimous, sent the jury back for further deliberations, and when a unanimous verdict was reached and the jury again polled the verdict was upheld.

The exact language of the Court at P. 315 is as follows:

"[5] Appellant's additional contention that the verdict was not unanimous likewise without basis. The jury returned a verdict finding appellant sane. At

the request of defense counsel, the jury was polled and one member thereof declared that he had reached an opposite verdict. The District Judge then instructed the jury to retire and resume its deliberations as the verdict was not acceptable. Upon further deliberation the jury again returned a verdict of sanity and, as before, was polled. All jurors stated that the verdict as read was their true verdict. Defense counsel thereupon accepted the poll as satisfactory.

We find no error in the District Court proceedings.

Affirmed."

In the instant case, the Court, after juror Crockett's initial answer, merely polled the jury to determine whether or not there was agreement as to Count IV. The Court had previously indicated that if the jury agreed to only part of the counts it would accept their verdicts on those counts. The defendant made no objection to this procedure previously announced by the Court.

In *United States* v. *Brooks,* 420 F.2d 1350, 1353 (D.C. Cir. 1969) the Court of Appeals for the District of Columbia Circuit held that Rule 31(d) of the Federal Rules of Criminal Procedure "clearly . . . invests the trial judge with a measure of discretion in assessing the impact of a dissenting vote during a jury poll, and the reasonable exercise of this discretion should be accorded proper deference by a reviewing court." The Court went on to say that a jury poll clearly is on a different footing than the *Brasfield* case supra, where the trial judge asked for the numerical division of the jury. The court stated:

[The jury poll] has long been regarded as a "useful" and necessary device for preserving the defendant's

> right to a unanimous verdict even though, as appellant points out, its psychological effect may be to exert more pressure toward conformity than mere questions on numerical division because of its tendency to isolate the dissenting jurors. (*Id.* at 1354.)

The trial Court made several inquiries of jurors in the *Brooks* case but the appellate court held that the inquiries were essentially neutral and not calculated to affect the juror's judgment. The situation is the same in the present case.

ADMISSION OF DOCUMENTS PRESENTED TO TAX AUDITORS

The defendant argues that Government's exhibits 23, 24, 25, 26, and 27 were erroneously admitted into evidence in violation of "the principle of law that prohibits the introduction of evidence showing other criminal misconduct on the part of the defendant." The defendant further claims that there was a long time lapse between the time when the respective income tax returns were prepared and the time the documents were presented. The defendant further argues that there is no logical connection between the intent at the time the tax return is prepared and the intent at the time the documents were presented. The Court finds that the jury was entitled to consider whether the defendant's action in submitting these documents to the tax auditors was consistent with his claim that he merely put information provided by the taxpayer on the returns. The jury was also entitled to consider this in connection with the defendant's statement to Agent Roper that all these documents (except the T.I.C.U. document) had been given him by the taxpayer. Evidence of other crimes may be presented when it is necessary to prove a material issue in the case and when its relevance

outweighs any prejudicial effect. *Wharton's Criminal Evidence* §245 (1972). Here the defendant admitted on cross-examination that he had prepared all of these documents. In a case involving a violation of 26 U.S.C. §7206(2) a basic issue is whether or not the defendant has made an innocent mistake, has innocently written down the information the taxpayer had given him or has acted knowingly and wilfully. The defendant Amos claimed that he had only put items on the tax returns which were provided to him by the taxpayers. This testimony on the part of the defendant was directly contradicted by the taxpayers' testimony. Thus, the question of intent was a basic issue for the jury's determination. The jury was entitled to consider whether Amos' actions were consistent with his testimony or with that of the taxpayers who testified Amos claimed deductions for amounts for which they did not supply him information.

The defendant alleges that "Agent Roper had no personal knowledge that defendant had in fact, presented these documents to the Internal Reveiue auditors, but he was, nevertheless, permitted to so testify." Agent Roper's testimony was to the effect that Mr. Amos had told him that these were documents he had presented to the two tax auditors and with the exception of the T.I.C.U. document, Mr. Amos claimed these documents were ones furnished to him by the taxpayers!

When Mr. Amos testified, he admitted that the documents were all prepared by him and had been presented to the two tax auditors in support of the deductions claimed on the taxpayer's return. Agent Roper's testimony was that Internal Revenue Auditors in the ordinary course of their business often make copies of the receipts or documents presented to them by the taxpayers in support of the deductions claimed on their return.

As to the question of whether or not the documents should have been excluded on the basis that they tended to show evidence of other crimes, there are many cases:

In *United States* v. *Fidanzi*, 411 F.2d 1361 (7th Cir.), cert. denied, 396 U.S. 929 (1969), the Seventh Circuit held that evidence relevant to a prosecution for filing fraudulent tax returns and failing to file returns was not inadmissible because it tended to show the defendant guilty of extortion, another crime with which he was not charged. The Court said at 1363:

> The conversation, however, was an intergral part of the transaction given rise to the payment of money to Fidanzi, and clearly relevant to the issues in the case. It was not rendered inadmissible because it tended to show Fidanzi guilty of some other crime.

The Seventh Circuit reaffirmed this position in *United States* v. *Turner*, 423 F.2d 481 (7th Cir.), *cert. denied*, 398 U.S. 967 (1970), where it said at 483-84:

> It is well-settled that evidence of other crimes may be presented when 'they are so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof; or tends logically to prove any element of the crime charged.' [citations omitted]

The Eighth Circuit has also been faced with this question and in *United States* v. *Edwards*, 443 F.2d 1286, 1293 (8th Cir.), cert. denied, 404 U.S. 944 (1971), held as follows:

> While evidence of another crime is generally inadmissible, it is admissible when used to establish a material fact or issue in the case. Spencer v. Texas, 385 U.S. 554, 560, 87 S.Ct. 648, 17 L.Ed. 2d 606, *reh. denied*, 386 U.S. 969, 87 S.Ct. 1015, 18 L.Ed. 2d 125 (1967);

Love v. United States, 386 F.2d 260, 266 (8th Cir. 1967), cert. denied, 390 U.S. 985, 88 S.Ct. 1111, 19 L.Ed. 2d 1286 (1968); Tucker v. United States, 375 F.2d 363, 371 n.9 (8th Cir.), cert. denied, 389 U.S. 888, 88 S.Ct. 128, 19 L.Ed. 2d 189 (1967); Hess v. United States, 254 F.2d 585, 588 (8th Cir. 1958); Smith v. United States, 236 F.2d 260, 267-268 (8th Cir.), cert. denied, 352 U.S. 909, 77 S.Ct. 148, 1 L.Ed. 2d 118 (1956), reh. denied, 353 U.S. 989, 77 S.Ct. 1280, 1 L.Ed. 2d 1147 (1957); Bram v. United States, 226 F.2d 858, 863 (8th Cir. 1955); Hardy v. United States, 199 F.2d 704, 707 (8th Cir. 1952). We extensively discussed this exception in Hardy v. United States, supra, where we said: '[I]t has repeatedly been held that the [exclusionary] rule will not be given application to exclude evidence which may incidentally show arrest, incarceration or conviction for some other offense, but which has relevancy and competency otherwise, and which the trial court responsibly deems a necessary or not inappropriate means in the particular situation of establishing some material fact or aspect of the prosecution's case.' and in Love v. United States, supra, 386 F.2d at 266, where we held; 'Evidence of other criminal acts may, however, become relevant and admissible where such evidence tends to determine certain issues in the case tried.' The admissibility of such evidence is within the trial court's discretion. See United States v. Lewis, 423 F.2d 457, 459 (8th Cir.), cert. denied, 400 U.S. 905, 91 S.Ct. 146, 27 L.Ed. 2d 142 (1970) and cases cited therein. In Wakaksan v. United States, 367 F.2d 639, 645 (8th Cir. 1966), cert. denied, 386 U. S. 994, 87 S.Ct. 1312, 18 L.Ed. 2d 341 (1967), we said: 'Unless it is clear that the qustioned evidence has no bearing upon any of the issues involved, this determination is left to the discretion of the trial judge.'

COURT'S READING OF JURY INSTRUCTIONS

In reading an instruction which stated as follows: "Several documents have been offered in this trial which the Government contends are false and fraudulent . . . ." Both counsel for the Government and the defendant were reading from the court's typed instructions as the court orally instructed the jury. In reading this instruction, the court made a slip of the tongue and substituted the word "defendant" for the word "government." The defendant argued that this confused the jury. It is quite doubtful that anyone would have noticed this slip of the tongue if he had not been following along the typed instructions as the court read them. The balance of the instruction read as follows:

> You are instructed that the defendant Lucian V. Amos was not charged with the submission of these documents and they are only allowed into this trial for purposes of showing the defendant's intent at the time he prepared the tax returns which are the subject matter of the indictment.

This was in conformity with the court's instructions to the jury at the time the documents were admitted into evidence, to-wit, that the documents were admitted only for purposes of the jury's consideration of the defendant's intent at the time the tax returns were prepared. It is not reasonable to assume that anyone (after four days of testimony in this trial) would not understand that it was the Government's and not the defendant's contention that the documents were false and fraudulent. Any question raised by this minor misstatement was clarified by the balance of the instructions.

It should also be noted that the court read the indictment in its entirety and instructed the jury as to the

particular statutory provision which the government alleged the defendant violated. The court further instructed the jury as to the essential elements of the offense. The court finds that if there was any error it was clearly harmless beyond a reasonable doubt.

CHARITABLE CONTRIBUTIONS INSTRUCTION

The defendant argues that the court should have instructed the jury on all possible items which could be claimed as charitable contributions. This is not necessary in view of the fact that the taxpayers testified they did not furnish Mr. Amos with information justifying his claiming the amount for charitable contributions that he placed on their returns. In fact, as to taxpayers David K. Taylor and Frederick Keith Taylor the taxpayers both testified they furnished the defendant Amos with no information as to any charitable contributions. It should be remembered that it was in regard to Frederick Keith Taylor's tax return that Mr. Amos produced the receipt from the Blue Ridge R.L.D.S. church showing contributions made to that church by Frederick Keith Taylor. Frederick Keith Taylor testified that he was not attending any church during the years in question and that he had never been to the Blue Ridge R.L.D.S. church and had not made any contribution to that church.

It should further be noted that the court instructed the jury that:

> The evidence in the case need not establish beyond a reasonable doubt that the deductions, as allowed by the revenue laws, totaled the exact amount alleged in the indictment, or that the allowable deductions were overstated in the exact amounts alleged; but only that *the accused wilfully overstated, or caused*

> to be overstated, in some substantial amount, the deductions to which the taxpayer was entitled under the Internal Revenue Laws, as charged in the indictment. (emphasis added.)

The Court further instructed the jury that if the defendant:

> in good faith believed that an income tax return, as prepared by him, truthfully reports the taxable income and allowable deductions of the taxpayer under the Internal Revenue laws, he cannot be guilty of wilfully preparing or presenting, or causing to be prepared or presented, a false or fraudulent return.

The Court's instructions clearly stated that the defendant could not be found guilty if he had innocently placed an incorerct figure on the taxpayer's return. The issue in the case was not Whether or not the defendant had misconstrued the tax law but whether or not he had wilfully and knowingly placed fraudulent items on the return. This was the issue presented to the jury and upon which they returned their verdict.

After a full consideration of all ten allegations of error offered by the defendant, the Court finds that each is without merit and defendant's Motion should be denied.

Order to that effect will be entered this day.

DATED: This 24 day of September 1973.

/s/ Paul X Williams
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1819

Lucien V. Amos,
Appellant,

v.

United States of America,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: March 12, 1974.
Filed: May 15, 1974.

Before GIBSON, BRIGHT and STEPHENSON, Circuit Judges.

BRIGHT, Circuit Judge.

Lucien V. Amos appeals his conviction on all counts of a 14-count indictment charging him with willfully aiding and assisting in the preparation of false and fraudulent income tax returns of various taxpayers in violation of 26 U.S.C. §7206(2). He makes these contentions: (1) that the trial judge, Judge Paul X Williams,[1] committed error in coercively questioning one juror during a poll of the jury; (2) that the trial judge erred in permitting

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1. Of the Western District of Arkansas sitting by special assignment in the United States District Court for the Western District of Missouri.

the prosecution to introduce evidence showing that prior to the dates covered by the indictment Amos had committed other crimes relating to income tax matters; and (3) that the trial judge erred in instructing the jury. We reject these claims and affirm the conviction.

Although Amos raises no claim of insufficiency of the evidence to support the convictions, we believe it helpful to briefly relate the factual background. Amos is a retired railroad postal service worker, who, for several years has engaged in the practice of assisting taxpayers in the preparation of their federal income tax returns. Generally, these taxpayers were wage earners of modest incomes. The evidence disclosed that as to each count, Amos made false claims for deductions from the taxpayers' income. The false deductions ranged from a low of about $500 on the return covered by count one to a high of about $2,700 on the return covered by count four.[2] In all but one instance, the various taxpayers who signed the returns were unaware of the false deductions. When some of these returns were audited by the Internal Revenue Service, Amos attempted to cover up some false deductions by submitting falsified receipts in support of the deductions.

With this background, we turn to the issues raised on appeal.

I.

THE JURY POLL

After deliberating for about an hour and fifteen minutes the jury returned with its verdict finding Amos guilty

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2. In his testimony, Amos contended that errors appeared in the questioned returns because of honest mistakes made in their preparation or as the result of erroneous information received from the taxpayer. The jury resolved any dispute in the testimony in favor of the Government.

on all counts. The court then proceeded to poll the jury. The eighth juror polled, Mr. Crockett, stated that he did not join in the verdict of guilty as to all counts. Thereupon the following colloquy occurred:

> THE COURT. Did you join in the verdict in any of the Counts?
>
> MR. CROCKETT. Yes, sir.
>
> THE COURT. The jury will retire to re-consider its verdicts, then as soon as you have reached unanimous verdicts—return the forms to Mr. Betts [jury foreman], there has been a misunderstanding. As soon as you have reached unanimous agreement, now - - - Now, Mr. Foreman, in as much as there are fourteen counts if there is unanimous consent on any counts indicate the ones on which it is unanimous because the Court would be inclined to receive that verdict that is unanimous as to a count; that would leave the jury to consider the ones that are not, am I making myself clear?
>
> MR. BETTS. Yes, sir.

Since the jury had been instructed that its verdict on any one count should not control the verdict on any other count, Judge Williams proceeded to inquire of juror Crockett whether he agreed with his fellow jurors, who had already responded, on any one count. Crockett indicated his disagreement with his fellow jurors' verdict on all coutns except as to a guilty verdict on count four. The judge then questioned the remaining four jurors as to whether each agreed with the guilty verdict on count four. Upon receiving affirmative replies, the court announced that it would receive the verdict only on count four and that it would send the jury back to reconsider the remaining counts. At that point, counsel for Amos

requested a further poll relating to count four. Accordingly, the court proceeded to repoll the jury on count four. In responding to the court's further query, juror Crockett said, "I don't think the one that prepared the income tax, the preparer, was guilty."

At this point, the trial judge declined to accept any verdict and in part instructed:

> Ladies and gentlemen of the jury, none of these verdicts will be received. This is not a unanimous verdict and we cannot receive it.

The jury returned after 25 minutes with another guilty verdict. Again the court polled the jury, but this time all 12 agreed with the foreman's pronouncement of guilt. Thereafter the court further inquired of juror Crockett, who responded as follows:

> THE COURT. Now, since we have had the matter of the identity, Mr. Crockett, are you certain you understand?
>
> MR. CROCKETT. I am certain I understand.
>
> THE COURT. You intend to return a verdict of guilty on each of the fourteen counts?
>
> MR. CROCKETT. Yes, sir.
>
> THE COURT. Mr. King [Amos' attorney], do you desire to address any questions to the members of the jury?
>
> MR. KING. No, Your Honor.

Amos now asserts that the interrogation in requiring a juror to disclose his vote in open court on each count and in thereafter directing that the jury retire to reconsider its verdict coerced a verdict in violation of Rule 31 (d), Fed. R. Crim. P. which, in pertinent part, reads:

> (d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

This rule specifically grants the trial judge a measure of discretion in determining either to require the jury to deliberate further or to grant a mistrial if it appears that the verdict was not unanimous. *See United States v. Brooks*, 420 F.2d 1350, 1353 (D.C. Cir. 1969). In this case, Judge Williams directed that the jury retire for further deliberation after learning that juror Crockett did not concur in the finding of guilt on any of the counts. Whether that ruling constitutes error depends on whether it is likely that the proceedings conducted by the trial court coerced the juror in arriving at his final verdict. *Compare United States* v. *Bendicks*, 449 F.2d 313, 315 (5th Cir. 1971); *Williams* v. *United States*, 419 F.2d 740, 744-47 (D.C. Cir. 1969) (en banc); *United States* v. *Brooks, supra* at 1351-54 (verdicts sustained as not coerced), *with United States* v. *Sexton*, 456 F.2d 961, 964-67 (5th Cir. 1972); *United States* v. *McCoy*, 429 F.2d 739, 741-742 (D.C. Cir. 1970); *Matthews* v. *United States*, 252 A.2d 505, 506-507 (D.C. Ct. App. 1969) (verdicts found to be coerced).[3]

We need note a distinction between a case where the trial judge interrogates the jury to clarify the confu-

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3. Generally, in the cases upholding verdicts as not coerced, the trial courts have questioned the polled juror to resolve any questions and then returned the juries for further deliberations. In the cases finding verdicts to be coerced, the trial courts have demanded in-court categorical responses from jurors who expressed reservations or recalcitrance when polled, instead of returning the juries for additional deliberations. *Cf. Bruce* v. *Chestnut Farms-Chevy Chase Dairy*, 126 F.2d 224, 225-226 (D.C. Cir. 1942) (civil suit).

sion engendered by a juror's response to a poll which is inconsistent with the foreman's announcement of the verdict, as in the present case, and one in which the court requires a jury to reveal its decision when no verdict has been returned, as in *Brasfield* v. *United States*, 272 U.S. 448 (1926). In the latter circumstances, the court's actions will be deemed coercive. But in the former, Rule 31(d) gives the court some latitude in polling of the jury to clear up an apparent confusion. *Williams* v. *United States*, 419 F.2d at 746.

Moreover, in evaluating the trial court's polling procedure, since the trial judge is present on the scene, we must pay due deference to his views on whether the recalcitrant juror's ultimate acquiescence in the verdict came freely, without pressure from the court. *United States* v. *Brooks*, 420 F.2d at 1353; *Jackson* v. *United States*, 386 F.2d 641, 643 (D.C. Cir. 1967).

Applying these principles, we hold that this record demonstrates that Judge Williams interrogated juror Crockett to dispel any confusion. When juror Crockett on the second interrogation, which was requested by Amos' counsel, indicated an apparent change of mind as to guilt on count four, Judge Williams promptly refused to receive the verdict and directed that the jury resume deliberations, adding this comment:

> I hope you are able to arrive at a verdict. If you are well and good, if you are not well and good.

Additionally, after the jury returned its verdict, Judge Williams ascertained from juror Crockett that he understood the import of the verdict and that he agreed with the guilty verdict on all counts.

We think it significant, too, that Amos' attorney voiced no objection to the court's procedures in polling the jury

or questioning of juror Crockett. This lack of objection by counsel permits an inference that the procedures utilized did not appear coercive at the time. *See United State* v. *Brooks*, 420 F.2d at 1353-54.[4]

In denying Amos' post-trial motion to arrest judgment or for a new trial, Judge Williams stated that "the inquiries were essentially neutral and not calculated to affect the juror's judgment." We find no error of law or fact in this determination and, accordingly, affirm this ruling.

II.

ALLEGED ERRORS DURING THE TRIAL

Amos' contention that the trial court erred in admitting evidence of other crimes relating to income tax matters rests on evidence introduced showing that defendant had claimed false deductions for at least one taxpayer commencing as early as 1964, although the indictment covered the tax returns prepared for the years 1968 to 1971, and the Government's introduction of certain exhibits showed that Amos attempted to verify false deductions with false documentation. The trial court rejected this same contention noting that the questioned evidence bore on intent and was logically connected with proof of elements of the crime charged, citing *United States* v. *Fidanzi*, 411 F.2d 1361 (7th Cir.), *cert. denied*, 396 U.S. 929 (1969); *United States* v. *Turner*, 423 F.2d 481 (7th Cir.), *cert. denied*, 398 U.S. 967 (1970), and *United States* v. *Edwards*, 443 F.2d 1286 (8th Cir.), *cert. denied*, 404 U.S. 944 (1971). We agree that the Government's proof was proper. The

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4. Amos' counsel made no objection to the questions asked by the trial court but, after the jury had retired to further consider their verdict, did move for a mistrial at the suggestion of the trial court to protect the record. Counsel in agreeing to the court's suggestion added nothing to the record by way of specific grounds for the requested relief.

admission of such evidence fell within the trial court's discretion.[5]

Amos also challenges certain instructions and comments to the jury. In particular, appellant directs an objection to the court's limitation in its explanation of charitable deductions under the Internal Revenue Code to amounts "actually paid during the taxable year by the taxpayer to religious, charitable, educational and similar non-profit organizations."

While the instructions did not specifically incorporate such items as out-of-pocket expenses which taxpayer might have incurred, the instruction in a general way appropriately explained the law in the context of the case since taxpayers testified that Amos did not receive information from them justifying the charitable contributions listed in various returns. The failure to further explain this deduction in light of the record at best must be deemed harmless error.

Finally, during the reading of the instructions the trial court erroneously misread the text of his instructions, stating that:

> Several documents have been offered in this trial which the defendant contends are false and fraudulent. You are instructed that the defendant, Lucien V. Amos, was not charged with the submission of these documents and they are only allowed into this trial for

5. In reviewing the transcript, we must note that the court reporter has failed to index the exhibits offered and received by designating the place in the transcript where any such exhibit was marked and where any such exhibit was either received or refused admission. This court finds it very difficult to review claims of error without such an index. Court reporters in fulfilling their duties to the court in preparing transcripts must properly index the materials contained therein including a listing of the exhibits as marked, received, or rejected.

> purposes of showing the defendant's intent at the time he prepared the tax returns which are the subject matter of the indictment.
>
> The underlined word should have read "Government."

Although the court apparently misspoke, we hold that the error must be deemed harmless. As Judge Williams aptly observed in his post-trial ruling on this issue:

> It is not reasonable to assume that anyone (after four days of testimony in this trial) would not understand that it was the Government's and not the defendant's contention that the documents were false and fraudulent. Any question raised by this minor misstatement was clarified by the balance of the instructions.

We agree.

Judgment affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1955

LUCIEN V. AMOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on 14 counts of willfully and knowingly aiding and assisting in the preparation of false and fraudulent federal income tax returns, in violation of Section 7206(2) of the Internal Revenue Code of 1954, 26 U.S.C. 7206(2). Petitioner was sentenced to a term of three years' imprisonment, all but three months of which was suspended and petitioner was placed on probation for three years. The court of appeals affirmed (Pet. App. A16-A24). Petitioner contends here (1) that the verdict was coerced by the manner in which the jury was polled in open court, (2) that the trial court erred in admitting evidence of other

crimes, and (3) that the trial court committed reversible error in inadvertently instructing the jury that petitioner, rather than the government, made a certain factual contention.

The evidence showed that petitioner, a tax-return preparer, claimed for his clients deductions to which he knew they were not entitled.

1. The court of appeals fully considered and properly rejected petitioner's contention (Pet. 10–13, 19–20) that the verdicts of guilty were coerced by the manner in which the jury was polled in open court (Pet. App. A17–A22; footnotes omitted):

> After deliberating for about an hour and fifteen minutes the jury returned with its verdict finding Amos guilty on all counts. The court then proceeded to poll the jury. The eighth juror polled, Mr. Crockett, stated that he did not join in the verdict of guilty as to all counts. Thereupon the following colloquy occurred:
>
> The COURT. Did you join in the verdict in any of the Counts?
>
> Mr. CROCKETT. Yes, sir.
>
> The COURT. The jury will retire to re-consider its verdicts, then as soon as you have reached unanimous verdicts—return the forms to Mr. Betts [jury foreman], there has been a misunderstanding. As soon as you have reached unanimous agreement, now—Now, Mr. Foreman, in as much as there are fourteen counts if there is unanimous consent on any counts indicate the ones on which it is unanimous because the Court would be inclined to receive that verdict that is unanimous as to a count;

that would leave the jury to consider the ones that are not, am I making myself clear?

Mr. BETTS. Yes, sir.

Since the jury had been instructed that its verdict on any one count should not control the verdict on any other count, Judge Williams proceeded to inquire of juror Crockett whether he agreed with his fellow jurors, who had already responded, on any one count. Crockett indicated his disagreement with his fellow jurors' verdict on all counts except as to a guilty verdict on count four. The judge then questioned the remaining four jurors as to whether each agreed with the guilty verdict on count four. Upon receiving affirmative replies, the court announced that it would receive the verdict only on count four and that it would send the jury back to reconsider the remaining counts. At that point, counsel for Amos requested a further poll relating to count four. Accordingly, the court proceeded to repoll the jury on count four. In responding to the court's further query, juror Crockett said, "I don't think the one that prepared the income tax, the preparer, was guilty."

At this point, the trial judge declined to accept any verdict and in part instructed:

"Ladies and gentlemen of the jury, none of these verdicts will be received. This is not a unanimous verdict and we cannot receive it."

The jury returned after 25 minutes with another guilty verdict. Again the court polled the jury, but this time all 12 agreed with the foreman's pronouncement of guilt. Thereafter the court further inquired of juror Crockett, who responded as follows:

The COURT. Now, since we have had the matter of the identity, Mr. Crockett, are you certain you understand?

Mr. CROCKETT. I am certain I understand.

The COURT. You intend to return a verdict of guilty on each of the fourteen counts?

Mr. CROCKETT. Yes, sir.

The COURT. Mr. King [Amos' attorney], do you desire to address any questions to the members of the jury?

Mr. KING. No, Your Honor.

Amos now asserts that the interrogation in requiring a juror to disclose his vote in open court on each count and in thereafter directing that the jury retire to reconsider its verdict coerced a verdict in violation of Rule 31(d), Fed. R. Crim. P. which, in pertinent part, reads:

"(d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged."

This rule specifically grants the trial judge a measure of discretion in determining either to require the jury to deliberate further or to grant a mistrial if it appears that the verdict was not unanimous. *See United States* v. *Brooks*, 420 F. 2d 1350, 1353 (D.C. Cir. 1969). In this case, Judge Williams directed that the jury retire for further deliberation after learning that juror Crockett did not concur in the finding of guilt on any of the counts. Whether that ruling constitutes error depends on whether

it is likely that the proceedings conducted by the trial court coerced the juror in arriving at his final verdict. *Compare United States* v. *Bendicks,* 449 F. 2d 313, 315 (5th Cir. 1971); *Williams* v. *United States,* 419 F. 2d 740, 744–47 (D.C. Cir. 1969) (en banc); *United States* v. *Brooks, supra* at 1351–54 (verdicts sustained as not coerced), with *United States* v. *Sexton,* 456 F. 2d 961, 964–67 (5th Cir. 1972); *United States* v. *McCoy,* 429 F. 2d 739, 741–742 (D.C. Cir. 1970); *Matthews* v. *United States,* 252 A. 2d 505, 506–507 (D.C. Ct. App. 1969) (verdicts found to be coerced).

We need note a distinction between a case where the trial judge interrogates the jury to clarify the confusion engendered by a juror's response to a poll which is inconsistent with the foreman's announcement of the verdict, as in the present case, and one in which the court requires a jury to reveal its decision when no verdict has been returned, as in *Brasfield* v. *United States,* 272 U.S. 448 (1926). In the latter circumstances, the court's actions will be deemed coercive. But in the former, Rule 31(d) gives the court some latitude in polling of the jury to clear up an apparent confusion. *Williams* v. *United States,* 419 F. 2d at 746.

Moreover, in evaluating the trial court's polling procedure, since the trial judge is present on the scene, we must pay due deference to his views on whether the recalcitrant juror's ultimate acquiescence in the verdict came freely, without pressure from the court. *United States* v. *Brooks,* 420 F. 2d at 1353; *Jackson* v. *United States,* 386 F. 2d 641, 643 (D.C. Cir. 1967).

Applying these principles, we hold that this record demonstrates that Judge Williams interrogated juror Crockett to dispel any confusion. When juror Crockett on the second interrogation, which was requested by Amos' counsel, indicated an apparent change of mind as to guilt on count four, Judge Williams promptly refused to receive the verdict and directed that the jury resume deliberations, adding this comment:

"I hope you are able to arrive at a verdict. If you are well and good, if you are not well and good."

Additionally, after the jury returned its verdict, Judge Williams ascertained from juror Crockett that he understood the import of the verdict and that he agreed with the guilty verdict on all counts.

We think it significant, too, that Amos' attorney voiced no objection to the court's procedures in polling the jury or questioning of juror Crockett. This lack of objection by counsel permits an inference that the procedures utilized did not appear coercive at the time. *See United States* v. *Brooks,* 420 F. 2d at 1353–54.

In denying Amos' post-trial motion to arrest judgment or for a new trial, Judge Williams stated that "the inquiries were essentially neutral and not calculated to affect the juror's judgment." We find no error of law or fact in this determination and, accordingly, affirm this ruling.

Contrary to petitioner's contention (Pet. 19–20), the decision below is not in conflict with the rule in the Fifth Circuit announced in *United States* v. *Sex-*

ton, supra. In *Sexton,* as the district court below explained (Pet. App. A7–A8), the trial court demanded that a juror cast her vote in open court after she had indicated that she had not voted in the jury room; the Fifth Circuit concluded that the trial court, by asking the juror to commit herself for the first time in open court, had deprived her of the opportunity of making an independent judgment in deliberation with the other jurors. In contrast, the trial judge here did not require juror Crockett to commit himself before returning to the jury room for further deliberation. Moreover, the procedure followed here was sanctioned by the Fifth Circuit in *United States* v. *Bendicks, supra,* a case that it cited with approval in *Sexton.*

2. Petitioner contends (Pet. 13–17) that the district court erred in admitting evidence that he had submitted false documents to the Interal Revenue Service in support of falsely claimed deductions. In support of this contention, petitioner points out that the willful submission of false documents is itself an offense under Section 7207 of the Code, and that at least one of the false documents related to a tax return not challenged in his indictment. But the evidence of petitioner's attempts to cover his tracks by submitting false documents showed a course of conduct indicating willfulness and was therefore admissible within the trial judge's discretion. See, *e.g., United States* v. *Fidenzi,* 411 F. 2d 1361 (C.A. 7), certiorari denied, 396 U.S. 929; *United States* v. *Edwards,* 443 F. 2d 1286 (C.A. 8), certiorari denied, 404 U.S. 944.

3. Nor is there any merit in petitioner's final contention (Pet. 17–19), that the trial court committed reversible error in charging the jury as follows (Pet. App. A23–A24):

> Several documents have been offered in this trial which the defendant contends are false and fraudulent. You are instructed that the defendant, Lucien V. Amos, was not charged with the submission of these documents and they are only allowed into this trial for the purpose of showing the defendant's intent at the time he prepared the tax returns which are the subject matter of the indictment.

As petitioner states (Pet. 17), the word "defendant" in the first sentence should have read "government". But both the trial court and the court of appeals agreed that the error was harmless and would not have misled the jurors who, after listening to four days of testimony, would have understood that the government, not petitioner, contended that the documents in question were false and fraudulent; the court of appeals further noted that any "question raised by this minor misstatement was clarified by the balance of the instructions" (Pet. App. A24).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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